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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1430

RENAULT ROBINSON,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

On Appeal From The Illinois Appellate Court

MOTION TO DISMISS OR AFFIRM

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MOTION

The City of Chicago, appellee herein, moves that appellant's appeal be dismissed for failure to present a substantial federal question. In the alternative, the appellee moves that the opinion of the Illinois Appellate Court be summarily affirmed because it is in accord with prior decisions of this court and those rendered by the courts of Illinois.

QUESTIONS PRESENTED

Whether appellant's claim of discriminatory prosecution was denied on adequate state grounds, since appellant failed to present such a claim prior to judgment in the trial court.

Whether the plea bargaining discussions, during which appellant was represented by counsel and which appellant stated he did not take seriously, constituted a violation of appellant's federally guaranteed rights.

Whether the federal Constitution prohibits the arresting of an uncooperative person suspected of harboring a concealed weapon who creates a disturbance by arguing loudly with investigating police officers in the lobby and in the auditorium of a theatre during the presentation of a play.

Whether an ordinance prohibiting an act in "such an unreasonable manner as to provoke, make or aid in making a breach of peace" is unconstitutionally vague in its application in circumstances where the defendant, suspected of harboring a concealed weapon, loudly argued with investigating officers in the lobby and auditorium of a theatre during a performance.

STATEMENT

Evidence was presented at the trial from which the jury could conclude* that the appellant, Renault Robinson, refused to identify himself to police officers investigating a complaint that he was carrying a pistol, but instead argued loudly with them in the lobby of a theater. The evidence showed that Robinson avoided the investigating officers by entering the auditorium of a theater for which he had no tickets during the performance of a play. He jostled aside a uniformed theater security guard to get into the theater, and continued arguing with the investigating officers in the auditorium and again outside it. Patrons attending the play were disturbed to the point of having to leave their seats and go outside to find out what the commotion was. Upon the jury finding of guilt, the court entered judgment, which the Illinois Appellate Court affirmed, that Robinson was guilty of committing "any act in such unreasonable manner as to provoke, make or aid in making a breach of peace." The Municipal Code of Chicago, Chapter 193, Section 193-1(a).

These events occurred in the Goodman Theatre which contains a small studio (student) theater and a large professional theater, both sharing a common foyer. On the night of appellant's arrest, some 850 people were attending the performances being given in both theaters, including "Man in the Glass Booth" presented in the professional theater. Reserved seat tickets were required for the professional theater, but seats were not reserved in the studio theater, and on the evening in question, the public was invited even without tickets.

* The appellant does not challenge the jury's verdict as being against the weight of evidence.

Just before the intermission scheduled for both performances, Robinson, a suspended police officer, appeared with his wife and an off-duty policeman. The ticket taker stated that when he asked Robinson for tickets, Robinson made several unintelligible remarks. The ticket taker noted that Robinson's diction was slurred, that he appeared to have been drinking and that the group was boisterous. As Robinson fumbled for tickets, and opened his suitcoat, the ticket taker stated, he noticed a gun stuck in the waistband of Robinson's slacks. The manager of the theater was present in the lobby and his testimony corroborated the ticket taker's description of the group's behavior.

Renault Robinson told the ticket taker that he had supplied material being used in the studio theatre presentation and had been given the tickets for the studio theater play. The ticket taker asked the group to remain in the lobby because only a few minutes remained until intermission. Despite the request, the group entered the studio theater.

After conferring with the theater's security guard, the ticket taker called the police. Initially, three officers responded to investigate the theater's report of a man with a gun. As the intermission was ending, the three officers entered the studio theater where Robinson's party was taking seats. The uniformed officer approached Robinson first, and then the two plain clothes officers observed, they testified, Robinson passing a weapon to his wife.* One officer grabbed Robinson's arm, and in the process pushed Mrs. Robinson, who fell.

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* It is undisputed that by departmental rule, off-duty Chicago Police Officers are required to carry their weapons. Robinson at the time of the incident was not so entitled, being under suspension.

Thereafter the entire party went into the corridor between the two theaters. The officers testified that on the way out of the theater after the attempt to pass off the gun, Mr. Robinson shouted, "Who is that fat pig, mother fucker, in the blue sportcoat who pushed my wife?"

When the party reached the lobby, they were approached by Sergeant Clancy, who had also been summoned by the "man with a gun" call. The sergeant, as officer in charge, asked the defendant and his friends for identification. Mr. Robinson refused to identify himself. He also failed to answer in any responsive way any of the sergeant's questions. Several times Robinson walked away from Sgt. Clancy and opened the doors to the large theater where "Glass Booth" was being performed. During this time Robinson was shouting, and also called the sergeant a "white mother fucker." A theater security guard testified that Robinson was loud and he could be heard inside the auditorium. While in the corridor, several persons from inside the large theater walked out to find out what was causing the commotion. "The Man in the Glass Booth" is a play depending for dramatic effect on periods of silence.

Without satisfying Clancy that he had no weapon and without establishing he was a police officer, Robinson entered the professional auditorium for which he had no ticket. In the process Robinson jostled an assistant theater manager aside. Robinson took a seat in the theater. The sergeant followed Mr. Robinson and ordered him to leave. Sergeant Clancy testified that his order was to leave the theater (in the sense of that particular auditorium) and return to the lobby. The ticket taker also was there and told Robinson to return to the lobby several times. The security guard also stated that the police order was to go back into the lobby because

Robinson was interrupting the show. At about this time Mr. Robinson turned to Sgt. Clancy and said something to the effect of "what do you need all these fucking pigs here for just the two of us?" Sergeant Clancy, who had not as yet elicited any proof from Robinson that the latter was a police officer, nor determined whether the defendant did or did not have a gun, ordered the defendant back into the lobby. He refused to obey Clancy's order. Sergeant Clancy repeated his order several times. The group finally proceeded back into the lobby.

From the time of Robinson's first contact with the police to his arrest, from 10 to 20 minutes elapsed, and three to five minutes of that time was spent in the professional theater. In contrast to the inferences made by appellant, he, his companion and Mrs. Robinson were not searched until after the arrest.* No guns were found on Mr. Robinson's person but two were found to be carried by his companion, Nathan Silas. Although Mr. Silas stated that both of the guns were his, he also testified that of those policemen who carry guns, the usual practice is for each to be holstered. Mr. Silas had but one holster, and one of the guns was in the waistband of his slacks under his sweater.

Judgment upon the jury's finding of guilty was entered October 26, 1972. Robinson indicated that he wished to file post trial motions, and the court set February 26, 1973 as the date for argument upon said motions. On February 20, 1976 appellant filed alternative motions for judgment n.o.v., in arrest of judgment and for a new trial. The motions stated, without supporting affidavits and without supporting allegations of

* Mr. Robinson stated he opened his suit coat to show he had no weapon. However, this did not show a weapon was not concealed elsewhere on his person.

fact, that the prosecution was discriminatory. Allegations of fact were not supplied until the date of argument. At that time appellant filed in the trial court his own affidavit and that of five police officers.

Mr. Robinson's affidavit and accompanying documents purported to show that he had had many disagreements with the department of police concerning policy. However no witness testifying at trial who was present in the theater when the incident occurred stated that he knew Robinson previously or knew anything about him.

A federal complaint was attached to the post-trial affidavits, showing that subsequent to the arrest but prior to his conviction Robinson had filed a civil rights action in the federal district court complaining of the department, its policies and its treatment of him. The affidavit also claimed that at unspecified times during the disorderly conduct trial, the prosecutor had approached him and his attorney to discuss the possibility of settlement of the two lawsuits by dismissing both of them. The affidavit also stated, paragraph 5, "on at least one occasion, I asked Mr. Mooradian [the prosecutor] whether I might be fired even if the prosecution were dropped. I asked him this simply to find out how far the police department and City of Chicago would go in attempting to encourage me to drop my federal lawsuit. I at no time intended to be a party to the trade-off suggested."

The February 26, 1973 documents also contained affidavits from five police officers. The affidavits incorporated a narrative statement purporting to contain all of the facts of the Robinson arrest. The officers' affidavits indicated that they believed no person would have been prosecuted for the kind of disturbance in a theater caused by Robinson.

ARGUMENT

I.

UNDER STATE LAW, THE APPELLANT WAIVED THE QUESTION OF DISCRIMINATORY PROSECUTION; NO SUBSTANTIAL FEDERAL ISSUE IS PRESENTED IN ANY CASE; THE CLAIM IS FRIVOLOUS.

The appellant did not raise his discriminatory prosecution claims during pre-trial proceedings, during the first jury trial, during the second jury trial following a hung jury in the first trial or in any motions prior to the judgment. Only in a post trial motion filed four days before scheduled argument, supported by allegations of facts set out in affidavits filed the day of argument upon his post trial motion, did Robinson first assert his discrimination claims.

In the state appellate proceedings, and here, Jurisdictional Statement, p. 16, Robinson claimed he could not raise the discriminatory prosecution issue earlier, since it was not until after entry of judgment upon the verdict that he could have known the character of the City's prosecution. Nevertheless, it is clear that Robinson was able to know from the beginning the factual matters he asserted in his post judgment motions. And certainly he knew, after the initial hung jury, the character of the City's case. One of his claims was that no person, absent a police department vendetta, would have been arrested and tried upon a charge of creating a disturbance in a theater during a performance. The arrest was made, he argues, and the prosecution commenced and continued despite a hung jury only because the defendant happened to be Renault Robinson, a person who in the past had

disagreed with certain departmental policies. The five affidavits filed in support of the claim were signed by police officers of patrol rank, the same as that of Robinson. They stated that, in their experience, it was not departmental policy to make arrests of persons behaving as Robinson did in the theater and that certainly no prosecution would result from such an arrest.

Such facts, if true, were within the appellant's knowledge from the outset. As an experienced officer of the same rank of the affiants, he was able to know what departmental policy was and the manner it was carried out. The information contained in the post trial motions and the affidavits was clearly available to him prior to and during the disorderly conduct trials.

The same thing is true of the coercion issue. In his post trial motion and in his own affidavit filed the day of argument, the appellant claimed that the prosecutor's discussions of dropping both the disorderly conduct prosecution and the appellant's federal claims against the department were evidence of the discrimination and departmental vendetta. Knowledge of this circumstance was obviously within appellant's own ken. He stated that he was present during the discussions and that they occurred at an unspecified date, but clearly prior to the jury verdict. Obviously, Robinson was in the best position to know of the City's offer; and it may not be said that these were facts unavailable to the appellant until after the judgment was entered. Although he knew of the alleged coercive conduct by the City attorney, he chose not to make it known at any time during the course of the trial until after the jury had rendered its adverse verdict and during the presentation of his post trial motions.

In his Jurisdictional Statement, p. 15, appellant notes that his post trial motions were filed pursuant to Illinois Supreme Court Rule 68.1(2) (Ill. Rev. Stat. 1971 ch. 110(A), section 68.1(2)). He states that nothing in that rule requires raising the claimed federal constitutional defenses during the trial.

But Illinois law requires that parties present all evidence available to them during the course of the trial. Post trial motions based on evidence not introduced at trial must show that that the evidence is newly discovered and not available to the party during trial.

The Illinois Supreme Court has stated:

> A primary requisite to allowance of a motion for a new trial under section 68.1 on the grounds of newly discovered evidence is that such evidence was not discoverable prior to trial by the exercise of ordinary diligence. [Citing cases.] We see no reason to distinguish between jury and non-jury cases in this regard, particularly where, as here, the evidence upon which the motion was based not only was discoverable but was actually known prior to the original trial. [*People ex rel. Drury v. Catholic Homes Bureau*, 34 Ill. 2d 84, 97 (1966).]

In particular, the Illinois rule does not permit affidavits to be filed unless truly new matter is presented:

> In support of its motion for a new trial, the defendant offered two affidavits. The court denied the motion for a new trial and ordered that the affidavits be stricken. The court did not err in refusing to consider these affidavits. The matter set out therein was discoverable prior to trial upon the exercise of reasonable diligence. [*Chicago v. Exchange National Bank*, 64 Ill. App. 2d 455, 465 (1965); *See also Fugate v. Sears, Roebuck & Co.*, 12 Ill. App. 3d 656, 674 (1974).]

Not only is the failure to assert discriminatory prosecution and to present facts supporting the charge during trial a waiver of the question under Illinois law, it is no violation of the Federal Constitution for a court to refuse to consider such untimely matter. This Court has recently ruled that in federal habeas corpus proceedings, defendants who have been represented by counsel may be deemed to have waived errors of constitutional dimension if not raised in a timely manner. In *Francis v. Henderson*, ... U.S. ..... (74-5808, May 3, 1976) this Court stated that if state law required a defendant to challenge a grand jury array prior to trial but the defendant, represented by counsel, failed to do so in accordance with that state procedure, the defendant may not raise the issue in a habeas corpus proceeding. This was true even though the error complained of, if proven, would have invalidated the grand jury proceeding upon constitutional grounds. Similarly, in *Estelle v. Williams*, ... U.S. ..... (74-676 May 3, 1976), this Court noted that, although it is error of constitutional dimension to require a defendant to appear at a jury trial clothed in prison garments, the defendant, represented by counsel, who failed to raise the issue to the trial court was deemed to have waived it.

The principle requiring defendants who are represented by counsel and who are possessed of all the facts to raise objections and errors at the proper time or have them considered waived is not new. This principle was stated in *Davis v. United States*, 411 U.S. 233, 241:

> The waiver provisions of Rule 12 (b)(2) are operative only with respect to claims of defect in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone

> to the burden and expense of a trial. If defendant were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that another claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

The appellant was aware of all the facts he ultimately presented to the trial court in support of his charge of discriminatory prosecution. Although he was represented by counsel throughout the entire proceedings, it was not until after judgment was entered upon the verdict of guilty, and then not until the day of oral argument upon post trial motions, that the appellant favored the court with his discrimination allegations. The criminal justice system was not intended to permit a defendant to hold defenses in reserve for use in case an adverse judgment is returned and then present them in a piecemeal fashion.

The Courts of Appeals cases relied on by appellant do not help him. In *United States v. Falk*, 479 F. 2d 616, 621 (7th Cir. 1973) the defendant raised the question of discrimination at the proper time, in pretrial motions and during the trial court proceedings; in *Dixon v. District of Columbia*, 394 F. 2d 967 (D.C. Cir. 1968), the defendant only discovered the facts supporting a claim of discrimination for the first time during a pretrial conference in the District of Columbia Court of Appeals. He raised the issue there. In each case the issue was timely raised as soon as the facts were known.

Aside from the issue of waiver, the appellants' claim of discriminatory prosecution is insubstantial on the merits. The potential danger allegedly occurring because of the City attorney's discussion with the appellant concerning mutual dismissal of the actions is that a person may be arrested and have prosecution begun for an impermissible purpose, to coerce him into waiving a right. That danger is not presented here, since the City's case against Robinson was not initiated to force Robinson's dismissal of the federal case. This is true because Robinson's federal case was not filed until some seven months following the disorderly conduct arrest. It should be further noted that no witness testified at the trial, and Robinson did not allege at the trial, that any of the persons employed by the theater initiating the disorderly conduct complaint or that any of the arresting officers present at the theater knew Robinson or knew about his disagreements with his employer. Indeed, there was evidence at the trial to show that Robinson refused to make his identity known to the arresting officer in charge.

Moreover, the settlement discussions did not have a coercive influence upon appellant. Discussions were held, as stated in his affidavit, in the presence of appellant's counsel. Moreover, he forthrightly stated that he did not intend to be a party to any proceedings, but only participated in the discussions "simply to find out how far the Police Department and City of Chicago would go."

Appellant's claim that his offense was so trivial that the police department practice was neither to arrest nor prosecute it is frivolous on its face. Disturbing the performance of a play is not trivial. Moreover, the appellant's arrest by persons who did not know his iden-

tity or employment history belies the alleged practice of ignoring such violations. And, as the Illinois Appellate Court pointed out, the five affidavits of fellow police officers stating what they considered the City's practice to be were not based upon all the facts of Robinson's arrest. Jurisdictional Statement, p. 11a.

II.

THE ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE, SINCE AS CONSTRUED, IT PROHIBITS THE APPELLANT'S CONDUCT; NO SUBSTANTIAL FIRST AMENDMENT QUESTION IS PRESENTED.

The only novelty presented by the present appeal is the phrasing of appellant's question, whether an ordinance may be "void for vagueness . . . as applied." Jurisdictional Statement, p. 4. However, no substantial or novel legal question is presented, since the Illinois Supreme Court has applied the ordinance or similar ones in nearly identical situations, and this Court has upheld similar disorderly conduct laws where actual disturbances have been created.

A disorderly conduct law is not unconstitutional because it does not, or cannot, catalogue every conceivable sort of human activity that might conceivably come within the purview of such laws. This court noted in *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) that, "condemned to the use of words, we can never expect mathematical certainty from our language." The test measuring whether conduct is impermissible under an ordinance prohibiting any "act [committed] in such unreasonable manner as to provoke, make or aid in making a breach of peace" is reasonableness of the conduct under the circumstances. This was the test articulated in the Illinois Appellate Court decision below, Jurisdictional Statement, p. 6a, as well as by the Illinois

Supreme Court in construing the present ordinance. Such a test was also approved by this Court.

In construing the instant ordinance, the Illinois Supreme Court has stated the test: "whether a violation has occurred is determined by the reasonableness of the conduct in relation to the surrounding circumstances." *City of Chicago v. Morris*, 47 Ill. 2d 226, 231 (1970). The Seventh Circuit Court of Appeals articulated the same test in construing the almost identical Illinois disorderly conduct statute.* The court stated "the emphasis of the statute is upon the tendency of the conduct to disturb others and to provoke disruption of public order and upon the unreasonableness of the activity when viewed in the context of the surrounding circumstances." *United States v. Woodard*, 376 F.2d 136, 139 (7th Cir. 1967).

This Court, too has upheld or articulated the test as taking into account the surrounding circumstances in deciding whether a defendant's conduct could be found to disturb the peace. The context of surrounding circumstances was the touchstone of the test articulated in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972):

> The nature of a place, "the pattern of its normal activity, dictate the kinds of regulation of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. The same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with normal activity of a particular place at a particular time.* [Emphasis added, footnote omitted.]

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* A person commits disorderly conduct when he knowingly . . . does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace. Ill. Rev. Stat. 1975, ch. 38, section 26-1 (a)(1).

In *Colten v. Kentucky*, 407 U.S. 104 (1972), this court also upheld a disorderly conduct ordinance which prohibited activity committed "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof" because, as construed by the state court, it did not permit conviction of the defendant without a consideration of the attendant circumstances.

In the attendant circumstances of the instant case, appellant's conduct was, in the words of the ordinance, "unreasonably [done in a] manner as to provoke, make or aid in making a breach of peace." The circumstances were not a park or street, but in the foyer and auditorium of a theater during the performance of a play. And, rather than allaying the fears of a superior police officer that he was not a man carrying a gun, the appellant refused to identify himself, by name or office, but instead shouted insulting words at the theater employees and police officer present. He attempted to evade questioning by pulling open the doors to the auditorium where the play was in progress, and jostled aside a theater employee to gain entrance to the auditorium. His loud discussion continued for a time inside the theater auditorium. Patrons attending the play were disturbed, as witnessed by their appearance outside the auditorium to find out the cause of the disturbance. This kind of behavior, as found by the jury, was unreasonable in the context of a theater. The ordinance's application to the appellant was undoubted under the circumstances and under the constructions articulated above.

Appellant insists that as interpreted by Illinois courts, imminence of violence is necessary for a conviction for disturbance of the peace. This contention was not raised at trial, where the appellant had the opportunity, but failed, to submit an instruction to that effect.

Nevertheless, under the rulings of Illinois Supreme Court and this Court, imminence of violence is not necessary if there is a real and palpable disturbance or imminence of such disturbance. In *Grayned*, the court upheld an ordinance prohibiting "making of any noise or diversion which disturbs or attempts to disturb the peace or good order" of a school, stating (in circumstances where disruption of classes, but no violence was imminent) that:

> although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. [408 U.S. at 112.]

Of course in the instant case witnesses testified both to disruption of the play and of the persons in the foyer. In *United States v. Woodward*, as well, the Illinois disorderly conduct statute was held to govern conduct disturbing but not violent. In *Woodard*, there were two defendants, one who disrupted a Congressional hearing with shouts but without violence, and a second who created a disturbance by attempting to enter the hearing room which was closed for lunch and falling limp to the floor when guards refused to let him enter. Illinois law does not require violence in order to convict for breach of peace.

Appellant also contends that he cannot be convicted for merely disturbing a police officer by arguing with him. But that undoubted proposition is not relevant to the present case, where the appellant's unreasonable behavior disturbed theater personnel and patrons and where the appellant shouldered aside a theater security guard to gain entrance to the theater auditorium for which he had no ticket. The circumstance in the present

case distinguishes it from *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973) in which the arrestee shouted at and was uncooperative with the police in an on-the-street arrest. Moreover, both the Illinois Supreme Court and this Court have upheld breach of peace convictions involving disorderly *conduct* directed at police officers in appropriate circumstances. In *City of Chicago v. Morris*, *supra*, the Illinois Supreme Court upheld a conviction under the present ordinance where the defendant's arguing with a police officer had the potential of provoking a crowd of agitated bystanders and interfered with the officer's arrest of a suspect. That case was almost identical with the arrest upheld in *Colten v. Kentucky*, in which the defendant was convicted of conducting an argument which interfered with a police officer attempting to arrest a third person. It should be noted that in *Colten* there was no testimony that the defendant's behavior would provoke violence and there were no innocent third parties who were disturbed.

Thus, as construed by the Illinois Supreme Court, and as similar ordinances have been construed by this Court, the ordinance does not suffer from unconstitutional vagueness, since the circumstances of the arrest must be taken into account and the appellant's conduct was unreasonable in the circumstances of his arrest. Similarly, the ordinance does not suffer from overbreadth. The appellant asserts that the ordinance is "void for . . . overbreadth as applied." Presumably this means that the present ordinance was applied to suppress a permitted First Amendment activity.

At the outset it should be noted that the appellant's behavior, itself, was an interference with the presentation of a play, a First Amendment activity. Moreover, the ideological content of Robinson's epithets about the

police was nil. Whatever the value of the content of his language, it was his *conduct* which created a disturbance and interference with the play. Robinson's inconsiderate attitude in the foyer and in the auditorium of the theater is reiterated in his Jurisdictional Statement, in which he states "the right of a theatregoer not to hear another person talk in a theatre lobby during a play is of little weight. . . ." At the theatre, the professional presentation of a play is not a public forum open to all who wish to express views. As Mr. Justice Douglas pointed out in his concurrence in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 305, 307 (1974), "while petitioner clearly has a right to express his views to those who wish to listen he had no right to force his message upon an audience incapable of declining to receive it." Even if the appellant's behavior had been appropriate to the open air in the street or in the park, he was not privileged to carry his disregard for the police or protests about his being asked questions to the audience viewing a play. He certainly had no right to carry that argument into the interior of the theater during the performance. Appellant's First Amendment contentions, whether based upon his right to protest his being questioned by police officers or to express a view of the police department in general, did not override the right of the theatregoers to be free from this disturbance. In the context of his arrest, the application of the ordinance to the appellant did not abridge his right to speak or protest. His First Amendment argument is frivolous.

CONCLUSION

For these reasons the decision of the Illinois Appellate Court rests upon independent state law; moreover its decision is in accord with decisions of this Court. The appeal should be dismissed or summarily affirmed.

Respectfully submitted,

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